STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2003
v	No. 237027 Wayne Circuit Court
SULLIVAN BROWN, Defendant-Appellant.	LC No. 00-012996-01

Before: O'Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(1)(a)[1] (count one), felon in possession of a firearm, MCL 750.224f (count two), and felony-firearm, MCL 750.227b (count three). He was sentenced to life in prison for the murder conviction, two to five years for the possession conviction, and two years for the felony-firearm conviction.[2] Defendant appeals as of right. We affirm.

I

On the afternoon of October 23, 2000, Kwan Campbell was shot to death in Detroit.[3] Campbell's friend, Gregory Murrie, testified that he saw Campbell walking down the other side of a residential street that day. Murrie said he saw a white Grand Marquis automobile drive up to where Campbell was, and two young men – one tall and thin and one short and stocky – alighted and spoke with Campbell for a couple of minutes.

Murrie then observed Campbell walking away from the men and around the side of a house. The house's occupant, Tracey Pryor, testified that between 12:30 and 1 p.m. that day, she saw a neighborhood man (who was later identified as the deceased) standing in her yard. Murrie

[1] The order of conviction and sentence lists count one as MCL "750316-A."

[2] The court ordered that counts one and two were to be served concurrently with respect to each other, but that counts one and two were to be served consecutively with respect to count three.

[3] There was evidence that defendant and Campbell may have been somewhat acquainted with each other.

and Pryor saw Campbell begin to run when they heard gunshots. Murrie testified eight to nine shots were fired by two people. Pryor heard Campbell yelling that he had been shot and saw him fall to the ground. Murrie and Pryor then watched the Grand Marquis drive away. Pryor called 911.[4]

Officer Charles Adams was patrolling the neighborhood at about 1 p.m. when he heard shots fired. He saw a white Grand Marquis automobile pull onto the same street and a bystander yelled to him, "those guys right there just shot my boy." Adams pursued the car, which initially refused to stop. The car finally stopped in front of a house that belonged to Mary Jenkins' mother. According to Mary's testimony, at 1 p.m. that day she arrived for a visit. Her three sons, Brandon, Corey, and Christopher Jenkins were playing video games there. Corey testified that he had arrived at the house at 12:30 p.m.

According to Adams and Derrick Riley, Adams's companion officer, one of the occupants of the Grand Marquis alighted after stopping the car and ran between some houses. Two other unidentified passengers ran into the house where the car was stopped. Riley briefly caught and temporarily lost his grip on one of the individuals, who he identified as Ronnie Brown. Mary testified that Ronnie and defendant are her "adopted nephews."

Mary heard a noise coming from the living room of the house, and on investigation, she saw police outside and noticed that her sons were upset for some reason. Corey said he knew nothing of the shooting or of any disturbance before being informed, when he went downstairs, that the police were outside. Adams and other officers took the five young men into custody from the house – defendant, Ronnie, Brandon, Corey, and Christopher.[5]

A 9 mm handgun was discovered in the Grand Marquis. Eight empty 9 mm shell casings were retrieved from the street vicinity of the Jenkins home, and two empty slugs were retrieved from the ground. One of the casings matched the gun discovered in the Marquis. Police found that the other seven casings were fired from another unidentified firearm. A search of the Jenkins home revealed no firearms or other evidence. Defendant's palm print was discovered on a side view mirror of the Marquis.

The defense called one of the Detroit Crime Lab's forensic chemists, who testified that hundreds of particles of gunshot residue remain on a shooter for approximately six hours following firing, and that the residue is easily removed by washing. Forensic tests revealed no gunshot residue on defendant, Corey, or Ronnie between four to six hours after the shooting. Brandon showed miniscule residue, but Christopher tested positive, although in an extremely low quantity.

[4] Campbell was pronounced dead on arrival at Henry Ford Hospital as a result of multiple gunshot wounds to the chest, thigh, and arm, among other wounds.

[5] Although arrested for murder, Corey was in custody for three days and then released without charge.

Brandon's statement to the police following the incident was introduced at trial pursuant to MRE 803(24) and 804(b)(7)[6] over defendant's hearsay objection. Brandon stated that he was at his grandmother's house playing video games with Ronnie and went upstairs when he heard a door slam and pounding on the door. When he went downstairs, he saw defendant running through the house and saw the police outside pounding on the door. Brandon stated that Christopher and defendant were not in the house before he went upstairs, implicating Christopher and defendant in the shooting.

Murrie identified defendant in a lineup, stating that he was 90 percent sure defendant was the individual he saw shoot Campbell.[7]

II

Defendant first argues that the trial court abused its discretion in admitting Brandon's hearsay statement into evidence and denying defendant's right to a fair trial and his Sixth Amendment right to confrontation. We disagree.

Whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v Katt*, 468 Mich 272, 278; ___ NW2d ___ (2003). Nonetheless, a preliminary issue of law regarding admissibility based on construction of a constitutional provision (including the Sixth Amendment) or a rule of evidence is subject to de novo review. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The trial court's contemporaneous assessment of the presentation, credibility, and effect of the evidence best determines its prejudicial effect, if any. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995).

MRE 803(24) is termed a residual hearsay exception where the availability of the declarant is immaterial, and is described as:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . . [MRE 803(24).]

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[6] At the time of this prosecution, the hearsay exception noted in MRE 804(b)(7) was in subsection (6), not subsection (7). See MRE 804, notes to 1996 and 2001 amendments.

[7] Evidence was introduced at trial that Murrie had a compromised medical status including a vision problem and cancer. Although Murrie claimed he was not under the influence at the time he observed the shooting, he admitted to a lengthy addiction to crack cocaine. Murrie was also on pain medication for his cancer condition.

Courts commonly refer to the lettered items above as the four elements evidence offered under MRE 803(24) must satisfy to be admissible. See *Katt*, *supra* at 279.

MRE 804(b)(7), known as a catch-all hearsay exception when the declarant is unavailable,[8] provides similarly.

> [A] hearsay statement admitted under [former] MRE 804(b)(6) must show a "'particularized guarantee[] of trustworthiness'" before a trial court may allow a party to introduce the evidence. [*Idaho v*] *Wright*, [497 US 805, 815; 110 S Ct 3139; 111 L Ed 2d 638 (1990)] (citation omitted). Without such a finding, the statements are "'presumptively unreliable'" and unconstitutional. *Id*. at 818 (citation omitted). A court must determine whether such statements are trustworthy and reliable after considering "the totality of the circumstances." *Id*. at 819. However, "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Id*.; see also *United States v Accetturo*, 966 F2d 631, 635-636 (CA 11, 1992). Corroborating evidence cannot justify admitting an otherwise untrustworthy statement. *Wright*, *supra* at 823. [*People v Smith*, 243 Mich App 657, 688; 625 NW2d 46 (2000).]

Evaluating the factors stated above under MRE 803(24), Brandon's statement satisfied all of them. First, the "statement [was] offered as evidence of a material fact," i.e., defendant's presence following the crime but not before. Second, "the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts." Defendant's presence at this point in the officers' pursuit of the perpetrator is certainly probative concerning who committed the crime, and, because Ronnie's statement was suppressed, the prosecution likely could not reasonably obtain other evidence. Third, "general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence" precisely because it inculpates the perpetrator of a murder. MRE 803(24). Consequently, the court did not abuse its discretion in admitting the evidence under MRE 803(24). See *Katt*, *supra*.

In the alternative, the evidence was also admissible under MRE 804(b)(7). "[P]articularized guarantees of trustworthiness" are indicated by the fact that Brandon was making a statement against his brother (Christopher) and his "adopted nephew" (defendant). Thus, while Brandon could be presumed to lie to protect his family or friend, here, Brandon clearly implicated them in a serious crime. As a result, "the relevant circumstances[,] includ[ing] . . . those that surround the making of the statement . . . render the declarant particularly worthy of belief." *Smith*, *supra*. Examining "the totality of the circumstances" as the trial court did, we hold that there was no error in admitting the statement against defendant. *Id*.; see also, e.g.,

[8] The trial court ruled that Brandon was "unavailable" because he refused to testify, citing his Fifth Amendment right not to incriminate himself. See MRE 804(a)(1).

People v Beasley, 239 Mich App 548, 552-553, 556 n 2; 609 NW2d 581 (2000) (statement inculpating the defendant and companions was properly admitted under MRE 803).

III

Next, defendant argues that the evidence was insufficient that he was one of the shooters in this case. We disagree.

The test of a sufficiency of the evidence claim is whether the evidence, taken as a whole, justifies submitting the case to the trier of fact or requires judgment as a matter of law. *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988). Criminal due process requires that the prosecutor's evidence supports a jury's conclusion that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.; *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). However, determining the weight of evidence or the credibility of witnesses is solely the jury's – and not this Court's – role. *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds ____ Mich ____; 658 NW2d 153 (2003).

In this case, a witness identified defendant as one of the two shooters, the police followed the shooters' car to Jenkins's home, defendant's palm print was found on the side of the car, and Brandon confirmed that defendant was not in the house until the police chased him there from near the crime scene. This is sufficient evidence to support the jury's verdict of guilty. See *Elkhoja*, *supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood